IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPLICATION NO. 298 OF 2004
IN
COMPANY PETITION NO. 521 OF 2002

Computer Plus ... Petitioner

Versus

Zee Interactive Learning
Systems Ltd. Co. ... Respondents

Ms. Sunita Poddar for Applicants.

Mr. K.K. Shroff with Mr. Jay Joshi and Amit Damle
i/by Mustafa Motiwala for Respondents.

CORAM : A.M. KHANWILKAR,J.
DATED : JULY 01, 2005

P.C.

. Heard counsel for the parties and perused the pleadings and affidavits. This application is filed for recalling the order dated 30.8.2002 passed by this court in Company Petition No. 521 of 2002. The said Company Petition came to be disposed of on the basis of consent terms signed by the parties and their advocates and taken on record and marked Exh. X. The consent terms agreed between the parties which resulted in withdrawal of the Company Petition would read thus :

"1. By consent agreed and declared that "the COMPANY" has paid an amount of Rs.12,82,644/- (Rupees Twelve Lakhs Eighty Two Thousand Six Hundred and Forty

Four only) as full and final settlement for the said claim made by the Petitioners abovenamed in the present Company Petition, vide Deed of Settlement dated 16th August, 2002 annexed herewith as "Annexure "A".

2. Agreed and declared that the Petitioner abovenamed have no further claim/s or interest of whatsoever nature from "the COMPANY ", as mentioned and agreed by and between the parties hereto in writing vide Deed of Settlement dated 16th August, 2002 between the Petitioner and "THE COMPANY."

3. The Petitioners acknowledge having received from "the COMPANY' a sum of Rs.12,82,644/- (Rupees Twelve Lakhs Eighty Thousand Six Hundred and Forty Four only) in full and final settlement of their claims in the present petition and also against any other claim/s arising therefrom.

4. The Petitioners to not desire to further peruse the matter quay 'THE

COMPANY' as the same is being settled out of Court.

5. The Petitioners do hereby withdraw all their claims in the present petition against "the COMPANY", subject to realisation of the cheques as mentioned in the Deed of Settlement.

6. The Petitioners hereby withdraw the present proceedings initiated by them against 'the COMAPNY' in the above petition.

7. Parties to bear their own costs. "

. The applicant seeks relief that the order passed on the basis of the consent terms be recalled and the Company petition be proceeded on merits in accordance with law. The basis on which this petition is maintained is that, the respondent company practiced fraud on the petitioner in pursuading to agree to terms as recorded in the consent terms without realising that the petitioner would not be able to recover the dues and computer provided by the respondent company to various

centres which was required to be returned to the Petitioner in terms of the agreement dated 16.8.2002. Clause (2) of the said settlement reads as follows :

> "2. CP agrees that he shall be solely responsible to withdraw all or any of his Computers, peripherals and the Computer related accessories at his own cost, arrangement and approach from the Network Access Centres (under Dept of Technical Education, Govt. of Mahrashtra), and CP does hereby agree that all and any of his claims till date against ZILS, its officers, its Franchisees for the Computers and the amounts as claimed by him under the Comapny Petition NO. 521 of 2002, or otherwise under any other Agreement or Memorandum of Understanding executed with ZILS stand settled withdrawn and there are no disputes or claims pending against ZILS after this settlement."

. It is the case of the applicant that after disposal of the company Petition, the applicant made sincere efforts to recover the computers.

which were provided to various centres by the respondent company for that purpose. The applicant sent letters addressed to the respondent company as well as the said centres. In response to the requisition made by the applicant, the centres declined to return the computers for the reasons recorded in the replies received by the applicant dated 12.2.2003 from Industrial Training Institute, Pusad, District Yavatmal, dated 12.2.2003 from Government polytechnic, Sakoli, Bhandara, dated 27.2.2003 from Industrial Training Institute, Umerkhed and dated 28.12.2001 from Government Polytechnic, Sakoli. The substance of the communications sent by the centres is that they would not recognize the applicant for return of the computers to the applicant as they were not bound by the arrangement arrived at between applicant and respondent. According to centres, they were entitled to retain the possession of the computers provided to them by the respondent company in view of the triparte agreement between the respondent, said computer centres and education department, Government of Maharashtra. The case of the centres is that they are entitled to receive certain amount from respondent company for which reason the possession of the computers cannot be parted with. In the affidavit in support of the applicant,

reference is made to these communications received by the applicant and it is alleged that fraud is played upon the applicant at the time of settlement of the company by suppressing the fact that the dues which as per respondent company was required to pay to the applicant will not be paid to the applicant by the said training centres.

. The charge against the respondent company that the applicant was persuaded to enter into settlement by the respondent by committing fraud on the applicant by suppressing relevant facts, in response the case of the respondent company is that, the fact that the centres were not willing to return the computer was known to the applicant even before the date of settlement. In fact that case is made out in the company petition filed by the applicant. In Paragraph 6 of the Company Petition, it is clearly averred on behalf of the applicant that the cost of computer was calculated because some of the centres refused to deliver back the same, though demanded by the applicants. This assertion was substantiated by placing on record communications received from different centres being letters dated 28.12.2001 from Government Polytechnic, Sakoli etc. suffice it to observe that the fact that computer centres were unwilling

to return the computers to the applicant was in the knowledge of the applicant as can be seen from the said communications annexed to the petition.

. Having realised this position, it was contended across the bar that in the communication received from Industrial Training Institute, Umarkhed dated 27.2.2003 for the first time, the applicant came to know that some triparte agreement has been entered between the respondent company, computer centres and the education department of Government of Maharashtra. It was therefore, contended that this relevant fact was suppressed by the respondent company which has resulted in practising fraud on the applicant in persuading the applicant to agree for disposal of the company Petition on the basis of consent terms tendered before the court. Even this submission has been countered by the counsel for the respondent company by placing reliance on the documents which are matter of record in the Company Application filed by the Applicant. Exh. B to the affidavit in support of the Company Application is legal notice sent by the applicant dated 14.1.2003 addressed to the respondent company the computer centres. IN Paragraph 1 reference is made to the fact that pursuance to the memorandum of understanding arrived at between applicant and

respondent company and triparte arrangement between the parties, the computers were delivered to the computer centres.The another document which is relied by the respondent company is annexed as Exh. J to the affidavit in support of the Company Application which is a letter sent to Government Polytechnic, Solapur which also refers to triparte arrangement between the parties. The respondent relying on the document Exh. B pressed into service on behalf of the applicant, contends that the existence of triparte arrangement was therefore, known to the applicant and it is too late in the day to contend to the contrary. In the first place, the cause which is sought to be canvassed that the settlement has been arrived at between the parties by committing fraud by suppressing triparte agreement is not made out as a specific ground to allege fraud. That cause is made out on the basis of documents which are now produced on record along with affidavit in support. Besides, I find substance in the argument of the respondent that going by the legal notice sent on behalf of the applicant, it is obvious that the applicant had knowledge about the triparte agreement as can be discerned from the averments in Para 1 of the said document Exh. B to the affidavit in support of the company Application.

. The counsel for the respondent rightly relied on the definition of fraud occurring in Section 17 of the Indian Contract Act, which reads thus :

> "Fraud defined - "Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another a party thereto or his agent, or to induce him to enter into the contract - (1) the suggestion, as a fact of that which is not true, by one who does not believe it to be true; (2) the active concealment of a fact by one having knowledge or belief of the fact; (3) a promise made without any intention of performing it; (4) any other act fitted to deceive; (5) any such act or omission as the law specially declared to be fraudulent."

. The consequences of any fraudulent Act is provided in Section 19 of the Indian Contract Act, which reads thus :

"When consent to an agreement is caused by coercion, fraud, or misrepresentation, the agreement is a contract, voidable at the option of the party whose consent was so caused.

. A party to a contract, whose consent was caused by fraud or misrepresentation, may , if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true."

. First explanation to section 19 provides that if such consent was caused by misrepresentation or by silence, fraudulent within the meaning of Section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

. If the applicant had knowledge about the stand taken by the computer centres which is evident from the correspondence exchanged between the parties as back as prior to filing of the company petition, and also about the existence of triparte agreement,

then obligation was on the applicant to discover the truth as to whether it was possible for the applicant to recover the computers inspite of the assurances given by the respondent company in that behalf. If that exercise was not undertaken before entering into settlement, it is not open to the applicant to question settlement or the order passed on the basis of consent terms.

. Reverting back to the settlement terms as arrived at between the parties on 16.8.2002, there is nothing to indicate that in the said settlement the respondent is made liable in any manner in the event the computer centres were to decline the delivery of computers in their possession or supplied the same in damaged condition. Such default clause is conspicuously absent in the settlement arrived at between the parties. On fair reading of Clause (2) of the settlement, it only means that it makes a provision requiring respondent to facilitate return of the computers from the computer centres to the applicant. That obligation has been discharged by the respondent company by sending communication to the computer centres on 11.12.2002. There is no positive evidence on record to suggest that after sending such communication by the respondent company, the

respondent instructed the computer centres not to comply with the request of the applicant for return of the computers in their possession. Viewed in this perspective, this is not a fit case for recall of the order passed on the basis of the consent terms dated 13.8.2002. The case of fraud as alleged in the application, is not substantiated for the reasons already recorded above.

. Accordingly, this application should fail and the same is dismissed. It is however, made clear that this order is not an expression of opinion on the merits of the claim between the parties. It will be open to the applicant to adopt such other remedy as may be permissible in law against the respondent company or computer centres, if so advised. All questions in the said proceedings are left open to be decided on its own merits.

(A.M. KHANWILKAR,J.)